



Craig J. Brown
Suite 250
1099 New York Avenue, N.W.
Washington, DC 20001
Phone 303-992-2503
Facsimile 303-896-1107

Assistant General Counsel

Via ECFS

October 30, 2019

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: *Improving Competitive Broadband Access to Multiple Tenant Environments*, GN Docket No. 17-142; *Petition for Preemption of Article 52 of the San Francisco Police Code Filed by the Multifamily Broadband Council*, MB Docket No. 17-91

Dear Ms. Dortch:

In its opening comments in the multiple tenant environment (MTE) rulemaking, CenturyLink recommended that the Commission continue to allow some forms of exclusivity through “preferred provider” agreements, such as bulk billing and exclusive marketing arrangements, while barring exclusive *access* arrangements. But CenturyLink also identified three worrisome and growing trends: unreasonable “pay to play” fees, especially in residential MTEs; MTE owners and tenants that are misinformed about the nature of the owner’s preferred provider relationship; and de facto exclusive access arrangements in some shopping malls and other commercial MTEs.¹ CenturyLink recommended several rule changes to address these market failures.²

Other parties’ filings in the initial and reply round only confirm the urgency of these problems and the need for CenturyLink’s proposed modifications to the Commission’s rules.

Unreasonable Pay to Play Fees

Over the past two decades, MTE owners increasingly have sought to “monetize” access to their property, especially in residential MTEs, by imposing excessive access fees of various forms, including through “door fees” and revenue sharing arrangements. These fees often significantly exceed the MTE owner’s cost of accommodating service providers’ access to the property and can account for 20 to 30% of the cost of extending service to a customer in an

¹ See Comments of CenturyLink, GN Docket No. 17-142, MB Docket No. 17-91 at 5-12 (filed Aug. 30, 2019) (CenturyLink Comments).

² *Id.* at 12-19.

MTE. Revenue sharing arrangements with graduated schedules are especially pernicious, because they incent property owners to steer business to their preferred service provider.³ To address this concern, CenturyLink recommends that the Commission prohibit providers from entering into revenue sharing and other access agreements that compensate the MTE owner beyond its actual cost of enabling service and performing any other contractual obligations on the provider's behalf.⁴

Other providers express the same concerns and propose similar remedies. For example, Verizon notes that “revenue sharing payments that exceed the MTE owner’s costs can undermine a provider’s business case for deploying to a building” and create incentives to exclude new entrants.⁵ Similarly, the Fiber Broadband Association and Uniti Fiber recommend that the Commission permit revenue sharing agreements only if they are cost-based and nondiscriminatory.⁶ Those opposing such restrictions fail to address these concerns, claiming instead that revenue sharing and other unconstrained mechanisms for compensating property owners are the norm in a competitive market economy and that cost-based limitations on building access agreements would be “fundamentally unfair.”⁷ But, of course, this ignores the fact that there is not a “competitive market” for access to a particular MTE. A provider cannot get access to serve an MTE tenant without obtaining permission from the MTE owner. It is by leveraging this bottleneck that MTE owners can extract above-cost compensation for allowing access to their tenants.⁸ Whether one, two, or even more providers pay these fees to obtain access to an MTE does not make them reasonable.⁹ Those fees still result in less competitive choice and higher rates for service in MTEs. Given this record, the Commission should adopt a targeted rule prohibiting providers from entering agreements that compensate the MTE owner beyond its actual cost of enabling service and performing any other contractual obligations on the provider's behalf.

³ *Id.* at 6-8.

⁴ *Id.* at 14-16.

⁵ See Reply Comments of Verizon at 5 (filed Sept. 30, 2019).

⁶ See Reply Comments of Fiber Broadband Association Reply at 2 (filed Sept. 30, 2019); Comments of Uniti Fiber at 8-9 (filed Aug. 30, 2019).

⁷ See Joint Reply Comments of National Multifamily Housing Council, the National Apartment Association, the International Council of Shopping Centers, the Institute of Real Estate Management, Nareit, the National Real Estate Investors Association, and the Real Estate Roundtable at 23-24 (filed Sept. 30, 2019) (Real Estate Associations Reply).

⁸ See CenturyLink Comments at 6-7.

⁹ See Joint Comments of the National Multifamily Housing Council, et al. at 8-14 (Real Estate Associations Comments) (claiming that the presence of broadband service, sometimes from multiple providers, in MTEs demonstrates the sufficiency of current regulation).

Misinformed MTE Owners and Tenants

In CenturyLink's experience, both MTE owners and tenants frequently are misinformed about the nature of the property owner's preferred provider arrangement in the MTE. It is not uncommon for CenturyLink to be told by an MTE owner that its preferred provider arrangement precludes CenturyLink from providing facilities-based service in the MTE. In July, for example, CenturyLink was told by an MTE owner in Hawaii: "Per our ground lease telecom and internet services must be provided by [Preferred Provider]. We are not permitted to allow any other providers for these services at this time." In other MTEs, property owners have told tenants, directly or indirectly, in recent months that they "require all tenants to use [their Preferred Provider]," or that the tenant is "not eligible for service from any vendor other than [the Preferred Provider] who is the malls [sic] vendor," or that "[n]o other vendors are allowed on mall property." Whether the preferred provider agreements actually contain these exclusive access restrictions is irrelevant. If MTE owners and tenants believe they do, those tenants will be deprived of their provider of choice and the benefits of meaningful broadband competition.¹⁰

This is especially problematic in commercial MTEs, where tenants are more likely to seek service from a particular provider with whom they have a national or regional business relationship. To address this concern, CenturyLink recommends that the Commission require providers to disclose publicly in plain English the existence and content of preferred provider agreements. This disclosure should be required in any marketing materials the service provider supplies to the property owner, tenants, or prospective tenants.¹¹

This issue is an ongoing problem. Just two weeks ago, for example, the owner of a mall in Ohio told CenturyLink that it had "recently entered into an agreement with a local internet provider that grants them access to the [mall]. Therefore, we will **not** be interested in providing CenturyLink access at this property." While it is possible that the mall owner's agreement with that provider contains such an unlawful exclusive access provision, it appears more likely that the property owner's representative is misinterpreting that provision. In any case, these difficulties have delayed CenturyLink's provision of service to the MTE tenant and could prevent it altogether. A properly implemented disclosure requirement would help address this problem by enabling a competing provider or a tenant to challenge such misinformation.

Any concerns about administrability can be addressed by, at least initially, limiting this requirement to commercial MTEs, where CenturyLink has had the most difficulty obtaining access to fulfill tenants' requests for service.

¹⁰ CenturyLink Comments at 8-10.

¹¹ *Id.* at 16-17.

De Facto Exclusive Access Arrangements

CenturyLink's single biggest concern with access to MTEs is a recent uptick, especially in shopping malls, of MTE owners refusing to allow CenturyLink to fulfill requests for service in the MTE except through a wholesale arrangement with the property owner's preferred provider. In some cases, the mall owner appears to have delegated all telecommunications issues in the mall to the preferred provider, including requests for access from other providers. Whether called exclusive wiring or marketing arrangements, revenue sharing arrangements, or something else, these are in effect exclusive access arrangements, because they limit on-net access to the MTE to that preferred provider. Such restrictions have made it difficult for CenturyLink to fulfill requests from national and regional retailers to provide on-net service to their mall locations. Indeed, in a three-day period in June, mall owners refused to allow CenturyLink direct access to tenants in Hawaii, New Jersey, California, and Texas, and instead directed it to obtain wholesale access from their preferred provider. These mandated off-net configurations are more expensive, less reliable, more difficult to troubleshoot, and harder to upgrade. They also prevent business customers from obtaining the true network diversity their mission-critical operations sometimes demand.¹²

To address this problem, CenturyLink recommends that the Commission prohibit providers from entering into a preferred provider agreement in an MTE unless competing on-net services are permitted on that property. The Commission also should reaffirm that if a provider controls the ducts, conduits, and rights-of-way in an MTE, it must provide just, reasonable, and nondiscriminatory access to that infrastructure and consider regulating preferred providers' MTE access services that are the exclusive means of reaching MTE tenants, to ensure those services are provided on reasonable rates and terms.¹³

In its comments, CenturyLink documented seven instances in which mall owners have refused to allow CenturyLink on-net access to serve mall tenants in recent months. This problem continues. In the case of the Ohio mall noted above, the property owner refused CenturyLink access to serve a national restaurant chain and then a national retailer with locations in the mall, stating that it is "not interested in providing single tenant access to our properties," in light of the access agreement it had entered with another provider.

Also earlier this month, CenturyLink received a "cease and desist" letter from a national communications provider that specializes in serving MTEs. In the letter, the provider claims to have a "Master Communications Installation and Service Agreement" with the owner of a Texas mall. That agreement purportedly gives the provider "the exclusive right to sell, market, and provide data and video services within the property, as well as the exclusive right to design, construct, install, operate, market, maintain, upgrade, repair, replace, access, and remove

¹² *Id.* at 10-12.

¹³ *Id.* at 17-19.

Infrastructure to provide those services.” Because the provider had become aware that CenturyLink “has installed or has begun installing infrastructure” at a national retailer’s store in the mall, the letter stated it was providing “formal notice to CenturyLink that it must immediately cease its infringement on [the provider’s] exclusive and [sic] Infrastructure rights, including its excavations and conduit installation, and any provision of services in conflict with [the provider’s] rights.” This blatant violation of the Commission’s rules confirms the need to clarify and strengthen those rules.

These incidents and those documented in CenturyLink’s comments are by no means the only times CenturyLink has been denied access to shopping malls in recent months. These are just the ones that CenturyLink was able to clearly document through emails or letters. Thus, this “handful of examples”¹⁴ provides concrete and sufficient evidence of a market failure requiring Commission action. Though it acknowledges that these examples support CenturyLink’s arguments, the Real Estate Associations wrongly claim that CenturyLink’s difficulties obtaining access to shopping malls resulted from CenturyLink “approach[ing] the incorrect individuals at the facility to which they were seeking access.”¹⁵ In fact, CenturyLink approached the point of contact for each property listed in CoStar, which is an online portal widely used in the real estate industry to gather information about specific properties, including appropriate points of contact.¹⁶ Typically, that point of contact is the individual who makes the decision whether to allow CenturyLink access to the property and, if access is granted, signs the access agreement. In many cases, that point of contact then refers CenturyLink to the local building engineer to perform a site survey or to its preferred provider. To the extent a property owner refers CenturyLink to local personnel who are misinformed, that is the responsibility of the property owner, not CenturyLink.

The Real Estate Associations also claim that CenturyLink ultimately was “allowed to provide service to the tenant.”¹⁷ This misses the point. In those instances, CenturyLink was not able to provide the MTE tenant the on-net service it requested. Instead, CenturyLink could only provide service via “Type II” access provided by the property owner’s preferred provider and presumably subject to the MTE owner’s revenue sharing agreement with that provider. Because Type II access requires CenturyLink to hand off traffic to another provider, CenturyLink cannot perform end-to-end testing when it activates service or proactively monitors the circuit once it is in service. Thus, the tenant’s circuit is inherently less reliable, more difficult to troubleshoot, and harder to upgrade. Rather than looking to one provider in the event of a service problem, two are now involved, potentially resulting in longer response times to restore service and

¹⁴ See Real Estate Associations Reply at 22.

¹⁵ *Id.* at 21-22.

¹⁶ See CoStar Website, *CoStar Property Professional*, <https://www.costar.com/products/costar-property-professional> (last visited Oct. 26, 2019).

¹⁷ Real Estate Associations Reply at 22.

complete repairs. Indeed, some tenants, such as financial services firms, explicitly specify in their contract that CenturyLink must provide the requested service on-net (i.e., solely over CenturyLink's network on an end-to-end basis), often because they need diversity to maintain continuity in the event of a network or Internet outage. While a single provider may offer diverse routing, it cannot provide the same level of diversity as services provided over independent networks. Other tenants seek on-net service to guarantee a specified quality of service, or Service Level Agreement, for latency or other network performance characteristics. Whatever the reason, limiting such a tenant to service provided through a wholesale arrangement with the MTE owner's preferred provider forces that customer to settle for service that does not fully meet its business needs.

CenturyLink's inability to secure on-net access to its customers also makes it more expensive to serve these customers, as CenturyLink typically is required to pay a separate access fee for each tenant it serves on the property, rather than being able to deploy a shared infrastructure to gain efficiency and save cost. The preferred provider's control of the communications infrastructure and services in the MTE also gives it little incentive to offer reasonable rates, terms, and conditions for its wholesale access service. In this way, it stands in a role very similar to a traditional utility that controlled the ducts, conduits, and rights-of-way or sole wire in an MTE. If the preferred provider imposes unreasonable terms, the competing providers' only recourse is to decline the request for service, which unfortunately CenturyLink sometimes has had to do, especially if the customer has ordered a relatively low revenue service.

In the end, these limitations prevent the MTE tenant from receiving the service it ordered and the one that best meets its needs, simply because it lacks control over the infrastructure needed to provide that service. It also pays more for that service, as CenturyLink typically passes through these access fees to the customer. Given these market failures, the Commission should adopt the modifications to the Commission's rules that CenturyLink outlined in its comments.

Sincerely,

/s/ Craig J. Brown